NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-1369

	Opinion Delivered May 27, 2009
HUTSON BURKS APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR-07-598]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE BARRY ALAN SIMS, JUDGE
	AFFIRMED

WAYMOND M. BROWN, Judge

A Pulaski County jury found Hutson Burks guilty of aggravated robbery and theft of property and sentenced him to twenty-seven years and eighteen years, respectively, in the Arkansas Department of Correction. The sentences are to be served concurrently. Burks argues on appeal that the trial court erred by (1) denying his motion to suppress the testimony of Emma Mickles and (2) denying his motion for a mistrial. We find no error and affirm.

Burks does not challenge the sufficiency of the evidence; therefore, only a brief recitation of the facts is necessary. The State alleged that Burks committed aggravated robbery and theft of property on November 24, 2006. According to the State, Burks robbed two employees of the Metropolitan National Bank, at gunpoint, while they were reloading an ATM machine located outside of the bank. Appellant's motion to suppress Mickles's

testimony was denied and his jury trial took place on August 21, 2008. Appellant was found guilty and sentenced to the Arkansas Department of Correction. This appeal followed.

An appellate court conducts a de novo review of a denial of a motion to suppress evidence based on a totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003); *Weatherford v. State*, 93 Ark. App. 30, 216 S.W.3d 150 (2005).

Appellant argues on appeal that the trial court erred in denying his motion to suppress the testimony of Emma Mickles. According to appellant, the motion was based on the fact that the testimony was illegally obtained and violated his rights to due process and equal protection. The State argues that the motion was properly denied because appellant lacks standing to challenge the reduction in Mickles's sentence, which was granted subsequent to his conviction.

Emma Mickles filed a petition for writ of error *coram nobis* on July 28, 2008. The petition stated that subsequent to her conviction, it was discovered that she was a key witness for the State against appellant. The petition requested that Mickles's sentence be reduced, provided that she testified truthfully at appellant's trial. A hearing on the petition was held on July 31, 2008, whereby the trial court took the issue under advisement. Appellant filed a motion to suppress Mickles's testimony on August 13, 2008, arguing that any testimony provided by Mickles would be inherently tainted due to the illegal offer and acquiescence to a reduction in her sentence by the State. Appellant also argued that such testimony would

violate his constitutional rights to equal protection and due process. Appellant's motion to suppress hearing took place on August 18, 2008. At the hearing, appellant's counsel argued that a writ of error *coram nobis* was not appropriate in Mickles's situation and that the State was trying to buy Mickles's testimony. The State argued that there was nothing illegal "being done on Ms. Mickles'[s] testimony." The State further argued that Mickles "may testify on her own even if the Court denies the agreement for reduction." The trial court denied appellant's motion to suppress. Appellant was convicted of aggravated robbery and theft of property. The judgment and commitment order was filed on August 27, 2008. Mickles was granted the writ of error *coram nobis* and received a sentence reduction on August 23, 2008.

Appellant attempts to collaterally attack Mickles's sentence reduction by arguing that her testimony was illegally obtained evidence and should have been suppressed. However, this argument is not convincing. Appellant was not a party to Mickles's hearing nor was he affected in any way by the subsequent grant of her petition for a reduced sentence. At the time Mickles received her sentence reduction, appellant had already been tried and found guilty by a jury. Thus, he had no standing to challenge Mickles's plea agreement. *See generally, Ross v. State*, 347 Ark. 334, 64 S.W.3d 272 (2002). Accordingly, we affirm the denial of the motion to suppress because appellant lacks standing.

Appellant also argues that the trial court erred by not granting his motion for a mistrial when the State introduced evidence of his drug usage without first obtaining leave from the court to do so. The following colloquy took place while Mickles was testifying:

> PROSECUTOR: Despite what he did, why did you decide not to go to Chicago with him?

EMMA MICKLES: I decided not to go because he was - - he was paranoid from the cocaine.

DEFENSE COUNSEL: Your Honor, can we approach?

PROSECUTOR: I'm sorry. That was not how she was going to answer that question before.

DEFENSE COUNSEL: I'm sorry, go ahead. I didn't mean to interrupt.

PROSECUTOR: If the Court can do a limiting instruction or whatever, I'll move - - I won't ask her any more questions along these lines.

DEFENSE COUNSEL: And I'm going to object and ask for a mistrial. This is like the third time their witnesses have talked about my client. They keep bringing up prior bad acts and now she's bringing in drug use which I specifically had- -did a motion in limine on, Your Honor. They're starting to portray my client as a bad person above and beyond this robbery which is going to slant the jury away. And I don't think after the third time a limiting instruction is going to be enough.

PROSECUTOR: That's - -

THE COURT: Oh, no, do you want a limiting instruction?

DEFENSE COUNSEL: I would object to a limiting instruction, Your Honor.

THE COURT: Motion for mistrial is denied at this time.

It is well settled that a mistrial is an extreme remedy that should be granted only when the error is beyond repair and cannot be corrected by curative relief. *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001). A trial court has wide discretion in granting or denying a motion for a mistrial, and the appellate court will not disturb the court's decision absent an abuse of discretion or manifest prejudice to the movant. *Id*. However, among the factors we consider on appeal is whether the defendant requested a cautionary instruction or admonition to the jury, and the failure of the defense to request an admonition may negate the mistrial

motion. *Rohrbach v. State*, 374 Ark. 271, ___ S.W.3d ___ (2008). Moreover, where the possible prejudice could have been cured by admonition by the trial court, our supreme court has found no abuse of discretion when defense counsel has refused the trial court's offer of such a curative instruction. *Ferguson v. State*, 343 Ark. 159, 177, 33 S.W.3d 115, 126 (2000).

Appellant asserts that he was prejudiced by the witness's statement because evidence of drug use "creates prejudice in the minds of the jury and makes justice impossible to achieve." Appellant further contends that "the knowledge that [appellant] was using drugs makes the State's burden of proof more easily achieved due to the resulting prejudice such evidence inevitably places in the minds of the jurors." Here, appellant refused the trial court's offer of a curative instruction, which could have cured the possible prejudice. Therefore, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

Affirmed.

KINARD, J., agrees.

VAUGHT, C.J., concurs.

VAUGHT, C.J., concurring. I agree with the majority that Burks does not have standing to collaterally attack the writ of error *coram nobis* granted in Mickles's case. However, I am compelled to write separately to express my concern at the apparent manipulation of our criminal-justice system by the prosecuting attorney and Mickles's defense attorney. And, I would be remiss if I failed to point out the trial judge's cavalier rubber stamping of this

arrangement. This case is one of the most troubling that I have considered in my time on this court.

According to the record that we have before us, Ms. Mickles pled guilty to several serious felonies and was sentenced to several concurrent terms of imprisonment that resulted in twenty years to serve. No appeal was taken, and she was serving her time when it was discovered that she could give incriminating evidence against Burks. The problem was how to reduce her previously executed sentences in order to induce her testimony. A deal was struck whereby her attorney filed a petition for writ of error *coram nobis* and the prosecutor waived jurisdiction, timeliness, and everything else. After the petition was presented to the trial judge, he agreed to grant the writ upon Mickles's testimony against Burks. Specifically, the judge said: "No, I'll do it. I'll do whatever you-all are asking. Absolutely, I will. I just want to make sure she ends up upholding her part of the deal and if she does, I'll grant whatever you-all agree to."

Mickles testified, and her sentence was reduced by the trial judge from twenty years to eight years, purportedly by a writ of error *coram nobis* to which no one objected and from which no one appealed. Why is this so egregious? Because none of the three players—the defense attorney, the prosecutor, or the trial judge—paid even the least amount of lip service to what a writ of error *coram nobis* is, or what its purpose is in criminal law.

The writ of error *coram nobis* is an ancient writ developed from the common law of England that provides a remedy where the convicted criminal defendant is not protected by his right of appeal because the record on its face discloses no error to the appellate court. *See*

Magby v. State, 348 Ark. 415, 72 S.W.3d 508 (2002) (per curiam) (citing *Woods*, *The Writ of Error Coram Nobis in Arkansas*, 8 Ark. L. Bul. 15 (1940)). A writ of error *coram nobis* is an extraordinarily rare remedy, more known for its denial than its approval. *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). Literally, *coram nobis* means our court, in our presence, before us. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). The essence of the writ of error *coram nobis* is that it is addressed to the very court that renders the judgment where injustice is alleged to have been done, rather than to an appellate or other court. BLACK'S LAW DICTIONARY 337 (6th ed. 1990).

The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature that are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999). *Coram nobis* proceedings are attended by a strong presumption that the judgment of conviction is valid. *Penn*, *supra.*

If the record presented to us is correct, no error—fundamental or otherwise—was ever alleged challenging Mickles's convictions. There was no allegation of insanity at the time of trial; no charge of a coerced guilty plea; no claim that material evidence was withheld by the prosecutor; and there was no post-conviction, third-party confession. Here, there was only a bartered deal: in exchange for testimony against Burks, your sentence will be reduced.

While I fault Mickles's defense attorney for filing a hollow petition, I find the actions of the prosecuting attorney, who waived all objections and conspired to subvert the system,

to be even more egregious. However, I am most concerned with the trial judge who abdicated a measure of responsibility and accountability. I hope that this is an aberration and not a common occurrence.

Although our court is limited in what it may do to respond under these circumstances, our supreme court—through its review and committee powers—may not be so constrained. It is my sincere hope that this case does not end here.